Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Preemption of State and Local Zoning and Land Use Restrictions On the Siting, Placement and Construction of Broadcast Station Transmission Facilities	)	MM Docket No. 97-182

REPLY COMMENTS OF
ARLINGTON COUNTY, VIRGINIA,
HENRICO COUNTY, VIRGINIA, AND
THE CITY OF ALEXANDRIA, VIRGINIA

Summary

Arlington County, Henrico County, and the City of Alexandria, Virginia (the "Counties and the City"), urge the Commission to reject the arguments of the National Association of Broadcasters (the "NAB") and other broadcasting interests, for the following reasons:

- By failing to respond to the NPRM's call for a "detailed record," the NAB implicitly concedes that preemption is unnecessary; there is no evidence that local governments unreasonably delay siting requests.
- The proposed preemption is much broader than the NAB admits, and would effectively eliminate local zoning authority over broadcasting facilities.
- State and local regulation intended to address aesthetic concerns should not be preempted; to do so would essentially gut local zoning laws.
- Preemption of local deadlines for action is unnecessary and the proposed time frames are too short.

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- The Commission should not assume that jurisdictions in urbanized areas, whether or not they are in the top ten markets, are able to respond to zoning requests any more quickly than others.

- If the Commission is to respect local prerogatives and preempt local laws only to the degree needed to achieve federal policy goals, then extending preemption to facilities other than DTV facilities is not necessary.

- Broadcasters and the Commission must do a better job of addressing public concern about exposure to RF emissions; until they do so, local governments must have discretion to act.

- The Commission should not attempt to serve as a mediator or arbitrator of disputes between local governments and broadcasters because the Commission has no expertise in local zoning matters.

For all these reasons, the Commission should not preempt local authority over the siting and construction of broadcast transmission facilities.

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Introduction

Arlington County, Henrico County, and the City of Alexandria, Virginia (jointly, the "Counties and the City"), again urge the Commission not to adopt the proposed rules. The opening comments of the broadcasting industry serve only to demonstrate that Commission action is unnecessary. Indeed, the principal proponents of the rules, the National Association of Broadcasters and the Association for Maximum Service Television (jointly, the "NAB") have not presented even a persuasive, let alone a compelling, case for preemption, and have failed to comply with the request in the Notice of Proposed Rulemaking ("NPRM") for submission of a "detailed record" supporting preemption. Only the most fervent advocate of the interests of the broadcasting industry could conclude, based on the record now before the Commission, that preemption is necessary or desirable.

1. In not responding to the NPRM's call for a "detailed record," the NAB implicitly concedes that preemption is unnecessary; there is no evidence that local governments unreasonably delay siting requests.

The NPRM recognized that the original NAB Petition contained only anecdotal evidence of the purported need for preemption. Consequently, the NPRM asked for "a detailed record of the nature and scope of broadcast tower siting issues, including delays and related matters encountered by broadcasters, tower owners and local government officials." NPRM at ¶ 19. Despite this specific request, the NAB and other broadcasting interests have produced little evidence showing the need for preemption.

The NAB Comments essentially ignore the Commission's request, offering up only one detailed example of a conflict between a broadcaster and a local government over antenna siting. Similarly, the comments of the North Carolina Association of Broadcasters and the Virginia Association of Broadcasters (jointly, the "VAB Comments"), provide only two examples, one involving a siting request dating back seven years, the other being the same example cited by the NAB in its comments. In other comments, the examples cited by broadcasters consist merely of additional anecdotes, unsupported by affidavits or declarations subject to the penalty of perjury. The result is a record that fails to demonstrate any need for the requested Commission action.[1]

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[1] Perhaps knowing that there would be few examples of local government behavior supporting its request, the NAB Comment suggests that broadcasters may not participate in this proceeding because they fear retaliation by local officials. NAB Comments at n. 34. This is akin to saying that the NAB knuckled under to Congress with respect to allocation of the DTV spectrum itself because of fear of retaliation by federal officials. The broadcasting industry is known for its ability to withstand political pressure at all levels and this argument is no more than a gratuitous attack on the integrity of local government officials.

The truth is that there have been very few controversies over the siting of broadcast towers in the past. The NAB is seeking to obtain special treatment, not accorded to any other industry, by inventing a crisis.[2]

The NPRM also asked whether any difficulties allegedly facing broadcasters are representative of those that may arise in the course of the roll-out of DTV. NPRM at ¶ 20. The answer is "Yes," but not because local governments will be standing in the way of deployment of DTV. It is "Yes," because there is no evidence of a problem in the past, and no reason to believe that there will be a problem in the future.

In fact, because there are so few examples of unreasonable local actions, the NAB has turned to introducing irrelevant and misleading information from an unrelated proceeding. NAB Comments at 20-22. The NAB's reference to the siting of non-broadcast wireless facilities is irrelevant because it is not direct evidence of a problem pertaining to broadcasting antennas.

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[2] Broadcasters have not shown that local authorities are disposed to block the siting and construction of antennas or that a significant number of broadcasters will face unreasonable action by local officials. As noted above, the VAB Comments offer only two examples of the types of local government action that the proposed rules are designed to preclude. In one, Fauquier County, Virginia, imposed restrictions on the siting of a tower. That request was apparently filed in the fall of 1990 and approved on January 15, 1991. Although some residents expressed concerns related to the health effects of RF emissions, the request was granted subject to conditions that did not restrict the owner's ability to use the tower as a radio transmission facility. It is difficult to see how this example illustrates that local governments will stand in the way of DTV deployment, since the request was granted in a matter of months and the conditions on the grant do not interfere with the intended purpose of the facility. Furthermore, since the case is nearly seven years old, it would seem that such incidents must be extremely rare.

In the second case, also cited by the NAB, the VAB claims that a siting application in Raleigh, North Carolina, is being held up because of issues arising out of unrelated litigation between the City and the applicant. Even assuming that this is the only reason for the delay, it is hardly evidence of a problem demanding nationwide preemption. If the Raleigh City Council is acting unreasonably, the applicant has recourse through the courts; if the Council is not being unreasonable, then the VAB's complaint is invalid. This single case does not establish a need for Commission action, or the existence of a national problem requiring the Commission's special expertise.

Wireless facilities raise public concern because there are often so many of them in a community. In addition, to ensure delivery of service it may be necessary to site wireless facilities in residential areas and other locations from which such facilities have traditionally been excluded. Broadcast towers raise very different issues: they are limited in number, much larger in size, and while a broadcaster may wish to site an antenna in a residential area for economic reasons, requiring siting elsewhere is unlikely to interfere with delivery of the service.

In addition, the alleged evidence of moratoria on siting of wireless facilities that the NAB wishes to introduce is misleading. For example, the NAB's allegation that the Cellular Telecommunications Industry Association's Petition for Declaratory Ruling (the "CTIA Petition") advised the Commission that 300 communities had adopted siting moratoria is incorrect. The CTIA Petition lists only 110 such moratoria, and the vast majority of those moratoria have long since expired, as they were generally only effective for 90-180 days. See Petition for Declaratory Ruling, Dec. 16, 1996, at n.3 and Attachment. The NAB's reference to 300 communities may have been to a list of communities provided to Chairman Hundt after the CTIA Petition had been filed, which proved inaccurate. *See, e.g.,* Comments of the City of St. Louis in DA 96-2140, filed Sep. 12, 1997 (stating that St. Louis did not have and never had a moratorium on antenna siting). In fact, the number of communities that have adopted moratoria is minuscule in relation to the thousands of local government bodies with zoning authority, and even those moratoria in effect are generally for relatively short periods. Finally, the NAB has not even attempted to show that any of the moratoria apply to broadcast towers.

Despite having ignored the NPRM's request for detailed factual information, the NAB asks the Commission to make policy based on three proposed broad findings: that state and local regulatory requirements are often incompatible with federal requirements; that state and local requirements often overlap with issues regulated comprehensively by the federal government;

and that state and local governments routinely impose delays and moratoria on siting of new facilities. NAB Comments at 22. None of those findings is supported by the evidence. The burden is on the NAB and the broadcasting industry to supply that evidence and demonstrate that there is a problem that the Commission must address. They have not met that burden and the Commission should not attempt to base policy on the empty record before it. Preemption is neither desirable nor necessary.

2. The proposed preemption is much broader than the NAB admits.

The NAB and VAB imply that the proposed rules would completely preempt local authority only in three specific areas of particular concern to the federal government, and leave local power over the remaining areas untouched. See NAB Comments at 5; VAB Comments at 3. This is not true. While the proposed rules would preempt any local action based on radio frequency interference, tower painting and lighting or the health effects of RF emissions, the rules would also preempt every other provision of law or regulation that "impairs" placement or construction of broadcast facilities. Only if a local government could show that a provision was expressly intended to address "health" and "safety" concerns would it be enforceable, and even then the proposed rules place the burden of proof on the local government and require that the local restriction be balanced against any federal interests involved. Thus, the proposed rules affect far more than just a few areas of special federal interest.

Moreover, under the proposed rules, the Commission would be required to construe and weigh local "health" and "safety" issues. These are inherently matters of local concern into which the Commission should not intrude. Under the proposed rules, the Commission could adopt a narrow view of those matters, which, in this context, would almost entirely preempt local zoning authority. There is simply no justification, in the record or otherwise, for this degree of federal preemption.

The Commission should reject the proposed rules because they would make it practically impossible for local governments to fairly balance competing interests. The proposed rules are a poorly disguised attempt to circumvent local authority over a broad range of local issues for the benefit of a small class of entities.

3. State and local regulation intended to address aesthetic concerns should not be preempted.

Aesthetics are a central part of the zoning process, because the appearance of a neighborhood directly affects economic concerns underlying the zoning laws. As we noted in our opening comments, at p. 12, Virginia law expressly authorizes local governments to take aesthetic considerations into account when exercising their zoning powers. Despite this, the NAB opposes the consideration of aesthetic issues in the zoning process. The NAB's arguments fall short, however, perhaps because the NAB is reluctant to disclose its true reasons for opposing aesthetic considerations.

Zoning authorities often attempt to resolve controversial siting requests by balancing competing interests: they may grant a siting request, but only subject to the applicant's agreement to comply with various provisions designed to reduce the visual effect of the proposed structure on its surroundings. Such provisions may include set-back, landscaping and screening requirements, and restrictions on where on a site ancillary facilities such as equipment buildings may be located. Even in the case of a tall antenna, such ground-level requirements may soften the effect of a facility. Although the NAB does not say so, we believe that much of the NAB's opposition to the use of aesthetic considerations is an attempt to obviate such requirements, simply because they may impose additional costs on broadcasters. Thus, the NAB's goal is to reduce the costs of DTV deployment as much as possible, regardless of the effects on other parties. But cost reduction is not a sufficient reason for federal preemption of local zoning authority.

The NAB claims that decisions based on aesthetics must be preempted because they are too subjective, and too easily used as pretexts to circumvent federal policy. In fact, however, zoning decisions are not subjective: They are governed by generally applicable standards and procedures. When a zoning authority addresses aesthetic issues, it does so within the context of procedures set forth in state and local law, and an established body of precedent in similar cases. Those procedures and precedent establish the parameters for what kinds of measures are reasonable in a particular zoning district in a given community, and if a zoning authority behaves arbitrarily, siting applicants have recourse to the courts. So it is simply incorrect to say that aesthetic issues are subjective and therefore subject to abuse.

Furthermore, it is not a subjective statement to say that broadcast towers and related facilities are generally not aesthetically pleasing. They may be beautiful to a tower owner with dollar signs in his eyes, but if the vast majority of people find something unattractive, it is fair to say that we have crossed the line from subjective to objective standards.

The NAB also attempts to obscure the issue by claiming that certain factors that broadcasters must consider under the Commission's rules adequately address aesthetic issues. These factors include: presence of high intensity lighting; effects on wilderness areas; presence of endangered species; effects on sites listed in or eligible to be listed in the National Register of Historic Places; effects on Indian religious sites; and various environmental factors. Other than concerns over high intensity lighting, none of these is strictly an aesthetic issue. The presence of endangered species and environmental matters have little or no aesthetic component, and the other three categories are concerned with environmental and social issues as well as aesthetic matters.

In any case, the categories listed by the NAB do little to address the kinds of aesthetic issues that concern local governments. We agree that broadcast towers should not be sited in

wilderness areas, near historic places or in environmentally sensitive locations. But we also believe that they generally should not be built in residential areas, and that if they are to be put up in many rural or even commercial districts they should probably be subject to set-back and screening requirements. In any case, those questions can be decided on a case-by-case basis by local zoning authorities as the need arises. The NAB, however, would have the Commission completely ignore issues of the most basic importance to local governments and their residents.

4. Preemption of local deadlines for action is unnecessary and the proposed time frames are too short.

The NAB's response to the Commission's suggestion that local governments be given 90 days to act on a siting request illustrates the unreasonableness of its position. NAB Comments at 16. As we demonstrated in our opening comments at p. 22, local processes are designed to protect the due process and property rights of all members of the community, not the narrow interests of one sector. They are time-consuming because they endeavor to be fair. Yet the NAB insists on imposing time frames that advance only its own goals.

The proposed periods of 21, 30 or 45 days are all too short, for the reasons given in our opening comments. If the Commission adopts some version of the proposed rules, the 90-day period suggested in the NPRM would be an improvement over the current proposal, notwithstanding the NAB's rejection of it. This statement, however, should not be interpreted as an endorsement of either preemption in general or the 90-day period in particular. As stated in our opening comments, our normal processes sometimes take longer than 90 days. Comments of Arlington County, *et al.*, at 18-19. We do not believe any limitation is appropriate, if only because both local governments and applicants benefit from flexibility. It makes no sense to adopt a uniformly and unreasonably strict rule merely because of the occasional difficult or complex case that may take longer.

Allowing a period greater than 90 days would be beneficial simply for a local government and an applicant to amicably resolve differences, or to allow the applicant to correct its own errors. Despite this, the NAB Comments assume that the only conceivable reason for delay is bad faith or unreasonableness on the part of the local government, as if no broadcaster would ever ask to build a tower in an inappropriate place. We agree that in most cases broadcasters behave responsibly despite the temptations induced by competitive and economic pressures, but that does not mean they should be exempt from the zoning and land use processes that bind every other property owner.

Similarly, unreasonable behavior by local governments is by no means the rule. In fact, it is extremely rare, as illustrated by the paucity of the NAB's evidence. The NAB's claim that preemption is necessary because local governments sometimes may take an "extraordinary length of time," NAB Comments at n.4, proves the point. In the vast majority of cases local processes do not take very long. The case in which there is a substantial delay is indeed extraordinary. But the NAB is not interested in the rational resolution of zoning issues. It desires only a weapon it can wield against local officials, regardless of the merits of a particular case.

For these reasons, we urge the Commission to reject any set time frame and trust that local governments will act within a reasonable time period, as they do in handling other siting requests.

5. The Commission should not assume that jurisdictions in urbanized areas, whether or not they are in the top ten markets, are able to respond to zoning requests any more quickly than others.

The NAB Comments argue that preemption should not be limited to the top markets in which the DTV roll-out schedule is most aggressive, because there is no rational basis for distinguishing between markets. NAB Comments at 3-4. The NAB Comments also claim that

the proposed time constraints are not a burden on larger markets, which may face multiple siting requests, because in such markets "the bureaucracy is correspondingly larger." Id. at 16. These observations are logically inconsistent and, if adopted, would lead the Commission to a false conclusion. In fact, the proposed rules are likely to impose substantial burdens on communities in all markets, and in any case the Commission cannot assume that communities in larger markets are better equipped to handle siting requests. The NAB seems to assume that a television market is coextensive with a particular jurisdiction, but this is the exception rather than the rule, even among the top ten markets. Many antennas are currently located in suburbs, and those suburbs do not necessarily have "correspondingly larger" zoning and planning staffs. Furthermore, the top ten markets and even many smaller markets are heavily urbanized areas. The increased population density and the generally more complex infrastructure and topography of urbanized areas mean that many more issues are likely to come up in the course of the zoning process. Therefore, it may actually be more difficult for such jurisdictions to meet the shorter deadlines, regardless of the size of the local government staff.

Thus, the NAB is correct when it says that there is no rational basis for distinguishing markets – but only because the Commission cannot predict which communities will receive siting requests, know what resources each community will have available, or know what issues will arise in a particular community. For all these reasons, the Commission should find that the proposed rules are unduly burdensome for all local governments and represent an unreasonable approach to the deployment of DTV.

6. If the Commission is to respect local prerogatives and preempt local laws only to the degree needed to achieve federal policy goals, then extending preemption to facilities other than DTV facilities is not necessary.

The NAB asserts that preemption should not be limited to actions and rules affecting only DTV facilities, essentially for reasons of administrative convenience. NAB Comments at 7-8.

Such a rule, however, would contradict the NPRM's stated sensitivity to the right of local governments to protect "the legitimate interests of their citizens" and the Commission's recognition that local authority should only be disturbed to the degree necessary to meet federal objectives.

The federal objective that allegedly requires preemption in this instance is the accelerated deployment of DTV. We have questioned whether that is a legitimate objective in our opening comments and continue to believe no preemption is warranted. To the extent that the Commission may preempt local law to further accelerated deployment, however, it should do so for that purpose and for that purpose only. By allowing any broadcaster to claim the benefits of the preemption, even one completely unaffected by DTV requirements, the proposed rules go far beyond the goal of deploying DTV. Such a preemption would not respect the legitimate interests of local governments or their citizens and would constitute an unnecessary and inappropriate exercise of federal power.

7. The NAB and the Commission must do a better job of addressing public concern about exposure to RF emissions.

The NAB blithely asserts that the Commission's rules regarding radio frequency emissions are sufficient, and that that is the end of the matter: Local governments should mind their own business. This position, which is apparently shared by the wireless communications industry and others, is short-sighted and mistaken because it fails to consider both human nature and the practical role of local governments.

It is not enough for the NAB to merely assert that the Commission's standards are technically adequate, that the self-certification system works well, and the threat of the loss of a broadcaster's license is sufficient to guarantee compliance. NAB Comments at 13-14. Local residents do not necessarily know these things, and even if they have been told, they may not be convinced. It is not self-evident to the lay person that all of the relevant technical and health

factors have been considered, and the lack of routine inspections, monitoring or enforcement by the Commission does nothing to allay public concern. For the Commission to merely adopt standards and then expect the public to accept them without any hesitation is naive.

In addition, the Commission and the industry must recognize that local governments do not exist for the benefit of broadcasters and telecommunications providers. They exist for the benefit of all the constituencies that make up a community, and are ultimately answerable only to the voters. Local government officials have an obligation to listen to every voice and to try to meet every concern.[3] If they fail to respond, sooner or later they will be replaced. Local governments cannot be expected to assume all of the burden of convincing their residents they have nothing to fear from the deployment of new technologies, nor should the federal government tell them to ignore their constituents. Local jurisdictions can provide a forum for addressing and resolving concerns, but the industry and the Commission must assume the primary role in addressing public fears. Expecting local governments to unquestioningly impose federal policy in this manner is somewhat akin to an unfunded mandate: the local government has no say in setting the policy, but bears all of the political cost.

If the public has nothing to fear from RF emissions, we urge the NAB and other industry groups to organize a campaign, a public debate, to educate the public accordingly. Until then, local governments must retain the discretion to require monitoring and engineering studies and impose other requirements so that they can meet their obligations to their residents.

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[3] Indeed, in the Fauquier County, Virginia, case cited by the VAB, it appears that the broadcaster has little to complain of. The local government listened to its constituents and attempted to accommodate all concerned by granting the request subject to relatively minor conditions that do not interfere with the broadcaster's ability to provide service.

8. The Commission should not serve as a mediator or arbitrator of disputes between local governments and broadcasters.

The Counties and the City reject the NAB's arguments that alternative dispute resolution would be beneficial in this context. Unlike the examples cited in the NAB comments (access to cable programming, open video systems, public mobile services and equipment standards) this is not an area in which the Commission has any special expertise.[4] The Commission staff is not conversant with zoning issues, or with the local conditions on which zoning decisions must be based. Consequently, zoning matters are best handled at the local level.

We also reject the NAB's contention that the Commission must have a direct right of review to break the "logjam" created by jurisdictional disputes between state and federal courts. The NAB has not presented a single example of such a dispute, much less evidence of a "logjam."

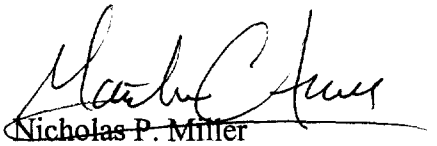
Conclusion

The Commission should reject the arguments of the NAB and other broadcasting interests because the proposed rules are not in the public interest and are not authorized by the Act. Local

[4] In arguing for preemption, the VAB Comments note that the FCC has "special expertise" in technical areas such as radio frequency interference. VAB Comments at 3-5. No doubt this is true, but we urge the Commission and the industry to recognize that local governments have corresponding expertise in the zoning field.

zoning authorities must retain the power to balance interests at the local level for the good of all constituents within a community. Once again we urge the Commission to close this proceeding without further action.

Respectfully submitted,



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